

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

EUGENE KLIEWER,

Petitioner,

v.

JASON BENNETT,

Respondent.

Case No. C24-5683-JHC-SKV

REPORT AND RECOMMENDATION

**I. INTRODUCTION**

Petitioner is a state prisoner who is currently confined at the Stafford Creek Corrections Center in Aberdeen, Washington, pursuant to a judgment and sentence entered in Pierce County Superior Court case number 22-1-01781-5. *See* Dkt. 7 at 1. Petitioner submitted a petition for writ of habeas corpus under 28 U.S.C. § 2241 in which he challenges the validity of his current custody, asserting that former RCW 9.94A.507 is unconstitutional on its face and violates his Sixth Amendment right to a jury trial. *Id.* at 7. He seeks to have this Court determine whether state law violates federal law and to “issue an unconditional writ releasing [him] from custody.” *Id.* at 8.

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1 On September 3, 2024, the Court issued an Order to Show Cause as to why the  
2 Petitioner's petition should not be dismissed for failure to exhaust state court remedies. Dkt. 13.  
3 The Court noted that if Petitioner failed to timely respond to the Order, it would recommend that  
4 this matter be dismissed. To date, Petitioner has not responded to the Court's Order. The Court  
5 now recommends dismissal.

## 6 II. DISCUSSION

7 The Ninth Circuit has held that "28 U.S.C. § 2254 is the exclusive vehicle for a habeas  
8 petition by a state prisoner in custody pursuant to a state court judgment." *White v. Lambert*, 370  
9 F.3d 1002, 1009-10 (9th Cir. 2004), *overruled on other grounds by Hayward v. Marshall*, 603  
10 F.3d 546 (9th Cir. 2010) (en banc). Petitioner's petition for writ of habeas corpus is therefore  
11 properly construed as one brought pursuant to § 2254. To obtain relief under § 2254, a petitioner  
12 must demonstrate that each of his claims for federal habeas relief has been properly exhausted in  
13 the state courts. 28 U.S.C. § 2254(b)-(c). The exhaustion requirement is a matter of comity,  
14 intended to afford the state courts "an initial opportunity to pass upon and correct alleged  
15 violations of its prisoners' federal rights." *Picard v. Connor*, 404 U.S. 270, 275 (1971) (internal  
16 quotation marks and citations omitted). To provide the state courts with the requisite  
17 "opportunity" to consider his federal claims, a prisoner must "fairly present" his claims to each  
18 appropriate state court for review, including a state supreme court with powers of discretionary  
19 review. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citing *Duncan v. Henry*, 513 U.S. 364, 365  
20 (1995), and *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)).

21 In this case, Petitioner makes clear that he has not presented the issue raised in his  
22 petition to any state appellate court for review. Dkt. 7 at 3-6. Petitioner's claim is therefore  
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1 unexhausted and not currently eligible for federal habeas review. The Court should accordingly  
2 dismiss the petition.

### 3 III. CERTIFICATE OF APPEALABILITY

4 A petitioner seeking post-conviction relief under § 2254 may appeal a district court's  
5 dismissal of his federal habeas petition only after obtaining a certificate of appealability from a  
6 district or circuit judge. A certificate of appealability may issue only where a petitioner has  
7 made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A  
8 petitioner satisfies this standard "by demonstrating that jurists of reason could disagree with the  
9 district court's resolution of his constitutional claims or that jurists could conclude the issues  
10 presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537  
11 U.S. 322, 327 (2003). The Court should find Petitioner has not met this standard and should  
12 accordingly deny Petitioner a certificate of appealability.

### 13 IV. CONCLUSION

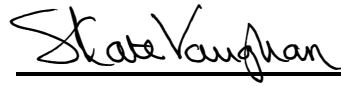
14 Because Petitioner failed to respond to the Court's Order, Dkt. 13, and because his claims  
15 for federal habeas relief have not been properly exhausted in the state courts, the Court  
16 recommends Petitioner's habeas petition be dismissed. The Court further recommends that a  
17 certificate of appealability be denied. A proposed order accompanies this Report and  
18 Recommendation.

### 19 V. OBJECTIONS

20 Objections to this Report and Recommendation, if any, should be filed with the Clerk and  
21 served upon all parties to this suit not later than **fourteen (14) days** from the date on which this  
22 Report and Recommendation is signed. Failure to file objections within the specified time may  
23 affect your right to appeal. Objections should be noted for consideration on the District Judge's

1 motions calendar **fourteen (14) days** from the date they are filed. Responses to objections may  
2 be filed by **the day before the noting date**. If no timely objections are filed, the matter will be  
3 ready for consideration by the District Judge on **October 29, 2024**.

4 Dated this 8th day of October, 2024.

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6 S. KATE VAUGHAN  
7 United States Magistrate Judge  
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